No. 14083

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JESUS ELIZARRARAZ,

Appellant,

vs.

HERBERT BROWNELL, JR., as Attorney General of the United States,

Appellee.

BRIEF FOR APPELLEE.

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Jurisdiction.

The District Court had jurisdiction of the action under the provisions of Section 503 of the Nationality Act of 1940 (8 U. S. C. 903) [Tr. 41-42, 43].

Judgment for the defendant was entered August 11, 1953 [Tr. 44-45], and the jurisdiction of this Court is invoked under the provisions of Title 28, U. S. C., Section 1291.

Statement of Facts.

Appellant was born in the United States in 1912. At the time of his birth, his parents were natives and citizens of Mexico, and appellant acquired Mexican citizenship by birth by virtue of the Mexican nationality of his parents [Tr. 42]. Sometime in 1932, appellant took up residence in Mexico and thereafter, on April 1, 1943, entered on duty as a police officer of the Police Force of the Federal District of Mexico and served in that capacity until 1947 [Tr. 9].

The Attorney General of the United States, through the Immigration and Naturalization Service, sought to deny the appellant the right to remain and reside in the United States as a citizen thereof on the ground that he expatriated himself under Section 401(d) of the Nationality Act of 1940 by accepting or performing the duties of a police officer of the Federal District of Mexico, to-wit: employment under the Government of a foreign state or a political subdivision thereof for which only nationals of Mexico are eligible [Tr. 42].

Appellant sought a declaration of nationality from the Court below [Tr. 3] to establish his right to remain in the United States as a citizen thereof. The Court below ruled that appellant had expatriated himself and granted judgment for the appellee. Whereupon, appellant filed this appeal.

Statutes Involved.

Section 401(d) of the Nationality Act of 1940 (8 U. S. C. A. 801(d)) provided in pertinent part as follows:

> "§801. General Means of Losing United States Nationality.
>
> A person who is a national of the United States, whether by birth or naturalization, shall lose his nationality by:
>
> * * * * * * * *
>
> (d) accepting, or performing the duties of, any office, post, or employment under the Government of a foreign state or political subdivision thereof for which only nationals of such state are eligible; * * *"

Section 402 of the Nationality Act of 1940 (8 U. S. C. A. 802) provided in pertinent part as follows:

> "§802. Presumption of Expatriation.
>
> A national of the United States who was born in the United States * * * shall be presumed to have expatriated himself under subsection * * * (d) of Section 801, when he shall remain for six months or longer within any foreign state of which he or either of his parents shall have been a national according to the laws of such foreign state, or within any place under control of such foreign state, and such presumption shall exist until overcome whether or not the individual has returned to the United States. * * *"

The Mexican law involved herein will be treated in the Argument to follow.

ARGUMENT.

This is not a case involving a claim of duress or a claim on behalf of the appellant that his employment under the Government of Mexico was involuntary. Appellant admits that on or about April 1, 1943, he entered on duty as a police officer of the Police Force of the Federal District of Mexico and served in that capacity until 1947.

Appellant claims rather that his employment was not, under Mexican law, employment for which only nationals of Mexico were eligible.

Thus, the only question presented is one of the requirements of Mexican law pertaining to appellant's employment on the Police Force and may be stated thusly:— Was appellant's employment that for which only nationals of Mexico were eligible?

I.

Appellant Was a Citizen of Mexico by Birth.

While appellant was born in the United States and thereby acquired United States citizenship, he was also a citizen of Mexico by birth under the "Political Constitution of the United States of Mexico," Title I, Chapter II, Article 30A. The translation of the Mexican Constitution was introduced, into evidence as an exhibit by Stipulation [Tr. 10] and it was further stipulated that said exhibit was a true and correct copy of said Mexican law [Tr. 10].

The law states:

"A. The following are Mexican by birth:

I. Individuals born within the territorial limits of the Republic, irrespective of the nationality of their parents.

II. Individuals born in foreign countries of Mexican parents; * * *."

Thus, it must be conceded that if only Mexican nationals were eligible for appellant's employment on the Mexican Police Force, he had such nationality according to Mexican law, "by birth," under A-II above.

II.

Only Mexican Citizens by Birth Could Serve in the Police Force of Mexico.

Article 32 of the "Political Constitution of the United States of Mexico" above referred to, covered by the same Stipulations of counsel as to its admittance in evidence and its correctness states in part:

> "* * * No alien may serve in the Army, nor in the Police Corps, nor in any other department of public safety during times of peace" [Tr. 13, 37].

Upon this language, appellant bases his entire defense. His contention is that since his service in the Mexico City Police Force was during "wartime," he was not required to have Mexican nationality to secure his employment. This reasoning is specious for two reasons.

First, the testimony in the court below of appellee's expert witness, William B. Stern, admitted by way of

his Affidavit by Stipulation [Tr. 10-11] is as follows [Tr. 37-38]:

> "Under the second sentence of Article 32, first paragraph *supra,* a non-Mexican may not serve, *inter alia,* in the Mexican Army and Police Forces in time of peace. Under this sentence, laws were passed in Mexico during World War II for the service of non-Mexicans in the Mexican Army, but no such law was passed and no such decree was issued providing for the service of non-Mexicans in the Mexican Police Forces. The rule mentioned below under (bb) that a Police Officer in the Police Force of the Mexican Federal District had to be a Mexican national by birth, was, therefore, not suspended on the basis of the Constitution, *supra,* Article 32, first paragraph, second sentence."

The interpretation is simple. A constitutional provision passed in time of peace, pertaining to peace, continues through time of war, unless altered by the passage of a subsequent law.

Second, "Regulations of the Preventive Police of the Federal District" certified as true and correct by the Vice Consul of the United States of America, admitted into evidence by Stipulation [Tr. 10] and set out at page 17 of the transcript of record, issued on November 12, 1941, by the Mexican President as a decree and published in the Mexican Official Gazette of December 4, 1941, which are still in force and effect except as to certain amendments which are immaterial to this inquiry, provide

as follows in Book 2, Title I, Chapter II, entitled Requirements, Article 31, subsection 1:

> "The requirements for membership in the Police Force are as follows:
>
> I. The applicant must be a Mexican citizen by birth. * * *"

Said regulations do not contain any qualifications of or exceptions from this Rule, nor has this article been amended since.

Thus, in addition to official excerpts, duly authenticated, of Mexican law upon which the appellee relies, there is the testimony of appellee's expert witness William B. Stern supporting their interpretation and all strengthening the inescapable conclusion that appellant's employment was employment under the Government of Mexico for which only nationals of Mexico were eligible.

III.

Supporting Evidence and Presumptions.

Appellant alleges that there is no evidence that appellant's Mexican nationality was made known to the authorities at the time of his employment. However, his personnel record [Tr. 21-22] lists him as a native of "Penjamo, Gto. Son of: Pascual Elizarraras, and of Conrada Vazquez."

Appellant further alleges that he was attached to the "Special Services" Department of the Police Force. However, in his personnel record [Tr. 22] there are no entries under "Special Services." It is appellee's contention that

the words "Special Services" thereon merely indicated a place where any special services could be listed. None are listed, and lacking any evidence to the contrary, it must be presumed that appellant engaged in none. In fact, his personnel record [Tr. 20-31] shows him to have been an ordinary police officer.

The acts upon which Section 801 expressly condition the consent of our Government to the expatriation of its citizens are stated objectively. When an American citizen has performed one of the enumerated overt acts, he has expatriated himself.

Savorgnan v. United States, 338 U. S. 491.

The overt acts must be voluntarily done.

Dos Reis ex rel. Camara v. Nicols (5th Cir.), 161 F. 2d 860.

Here, there is no defense of duress. Appellant voluntarily joined the Police Force. He served from 1943 to 1947 in the stated employment and Section 402 of the Nationality Act of 1940 (8 U. S. C. A. 802), raises a presumption of expatriation which the appellant had the burden of overcoming. This he has failed to do.

At a time when others with dual nationality were registering for military service with the United States and indicating their allegiance to the country of their birth, appellant chose to remain in Mexico and to seek employment there under the Mexican Government. That employment as a Police Officer in the Federal District of Mexico is employment under the Government of a foreign

state or a political subdivision thereof within the meaning of 401(d) of the Nationality Act of 1940 (8 U. S. C. A. 801(d)), is not disputed. It is supported by expert testimony [Tr. 34-36].

Conclusion.

Thus, to summarize, we have the following situation:

1. Appellant had dual citizenship at birth, to-wit: both Mexican and United States nationality.

2. Voluntary employment in the Police Force of the Federal District of Mexico, a foreign state, or political subdivision thereof within the meaning and intent of Section 401(d) of the Nationality Act of 1940 (8 U. S. C. A. 801(d)).

3. Mexican law submitted in proper translation with expert testimony as to the effect thereof that only citizens of Mexico by birth are eligible for such employment.

4. The presumption of expatriation raised by extended residence in Mexico under Section 402 of the Nationality Act of 1940 (8 U. S. C. A. 802).

Appellant's sole defense is that the Mexican Constitution required citizenship, by birth "in time of peace" and thus had no application as a requirement to employment in time of war. This is a mere contention of the appellant, unsupported by any evidence whatsoever, and flatly contradicted by the police regulations and the expert testimony offered by the appellee. The direct requirement of the police regulations in effect at all times herein men-

tioned was "for membership in the police, it is required: I. To be a Mexican by birth." Said regulations do not contain any qualifications of or exceptions from this rule, and the Mexican law on its face and as interpreted by appellee's expert witness required Mexican nationality as a prerequisite to appellant's employment. It was employment for which *only* nationals of Mexico were eligible.

Wherefore appellee respectfully prays that the judgment of the District Court be affirmed.

Respectfully submitted,

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